pleted. A Temporary Occupation Licence had been issued for its occupation. It was ready for use as a tenement. The fact that it was on that date neither in use nor was its ownership transferred is irrelevant in my opinion for the purposes of section 18. What is important for the purposes of section 18 is that a tenement existed and the Chief Assessor was not only well within his powers in issuing the notice in question but was also under a statutory duty to do so by virtue of section 9(1) of the Act which requires him to prepare and maintain a list of "all houses, buildings, lands and tenements". Failure to issue the notice would have been breach of a statutory duty because he could have been accused of deliberately omitting to amend the Valuation List and including in it a tenement the existence of which he very well knew.

Lastly, the problem in this case as already pointed out is not a tax collection problem. It is not whether tax is payable or not payable on the subject unit or payable from what date. The issue is simply whether or not the Chief Assessor was within his powers in issuing the notice in question. If he was, then it is a valid notice. The consequences that follow the issue of a notice under section 18(2) of the Act are not in issue in this case. Inclusion of a property in the Valuation List and payment of property tax on it are two different things under the Act. As stated earlier we are not concerned in this case with the latter.

For the reasons that I have given, I hold that the notice dated September 29, 1975 is valid because on that date there was a relevant inaccuracy in the Valuation List and the Chief Assessor had a duty to remove it. By issuing the notice he was merely exercising his powers under section 18 of the Act to carry out his statutory duty under section 9(1) of the Act of maintaining an accurate Valuation List.

The appeal is dismissed with costs. I am grateful to both counsel for their assistance in providing written submissions which have been of considerable help.

Appeal dismissed.

Solicitors: *Chan, Goh & Co.*

CLAIROL INCORPORATED v. TOO DIT COMPANY

[O.C.J. (Simnathuray J.) February 6, 1980]
[Singapore — Civil Suit No. 2851 of 1976]

Passing-off — Objection by plaintiffs/manufacturers of herbal shampoo as to get-up and label of defendant's product — Whether particular get-up used by plaintiffs had become associated exclusively with their goods — Question of fact.

The plaintiffs in this case were manufacturers of a herbal shampoo under the trade name "Clairol". Since November 1972, through their sister company, Bristol Myers (Singapore) Pte. Ltd., they have been marketing Clairol in Singapore.

The bottles of the shampoo were transparent plastic. They were of different sizes and had three different formulations which were distinguished by different coloured caps on the bottles. The colour of the borders of labels were different for the different formulations. The trade name "Clairol" was on the label and there were descriptive words on it. On the label was a trade mark, a graphic design of a young woman in a pool surrounded by green leaves and coloured flowers.

The defendant, a company registered in 1973 manufactured shampoo under a trade name "Backer" and a trademark which was registered in 1963. In 1976 the defendant went into herbal essence shampoo. The shampoo was sold in bottles with green caps which were of the same size and shape as the bottle, P157, of the plaintiffs. The label on the defendant's bottle P158, was similar in form and colour to the label on P157. So were the descriptive words on it. But the trade name on the bottle was "Backer" and, instead of a young girl in a pool of water, the defendant's label had the trade mark, a yellow circle and in it the device of a bent arm holding an arrow. There were leaves and flowers surrounding the circle about alike but different in size to those on P157.

The plaintiffs took objection to the get-up of the defendant's product and claimed passing-off and infringement of copyright against the defendant.

Held, dismissing the plaintiffs' claim: (1) this was not the case where a particular get-up of goods had been for a long time, for many years, on the market, so as to become identified in course of time with the plaintiffs' goods and with no others, so that that get-up almost of necessity was identified in the market or amongst the public as representing the plaintiff's goods;

(2) the said two labels unquestionably did not resemble each other. It was the different trade names and trade marks of the two products that distinguished each of them;

(3) the plaintiffs had not made out a case of reputation in the get-up of their product.

Cases referred to:-

(1) *Asian Organisation Ltd.* v. *White Hudson & Co.* [1962] M.L.J. 139 @ 140-141.

(2) *White Hudson & Co.* v. *Asian Organisation Ltd.* [1965] 1 M.L.J. 186 @ 189.

(3) *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.* (1900) 17 R.P.C. 48. See [1901] A.C. 308.

(4) *Payton & Co. Ltd.* v. *Titus Ward & Co. Ltd.* (1900) 17 R.P.C. 58 @ 64.

(5) *J.B. Williams Company* v. *R. Bronnley & Co. Ltd.* (1909) 26 R.P.C. 765 @ 771.

(6) *Boh Plantations Sdn. Bhd.* v. *Gui Nee Chuan & Ors.* [1975] 2 M.L.J. 213 @ 215.

CIVIL SUIT.

Miss C.A. Remedios for the plaintiffs.

Quek Kai Kok for the defendant.

Cur. Adv. Vult.

Simnathuray J.: In this passing-off action and for infringement of copyright, the plaintiffs, Clairol Incorporated, a company incorporated in the United States of America, are manufacturers of a herbal essence shampoo under the trade name "Clairol". Since November 1972, through their sister company, Bristol-Myers (Singapore) Private Limited, they have been marketing Clairol in Singapore.

The shampoo is packed in transparent plastic bottles of different sizes and have three different formulations which are distinguished by different caps on the bottles. The colours of the caps are white, green or yellow. The exhibit P157 tendered in court is a bottle, one of the three sizes, with a green cap.

The bottles have white labels, and the one on the bottle, P157, has a green border. From the photographs in the Agreed Bundle, it is seen that the colours of the borders of labels differ for the different formulations. The trade name "Clairol" is on the label, and there are descriptive words on it. On the label also is a trade mark, a graphic design of a young woman in a pool surrounded by green leaves and coloured flowers.

The defendant, Too Dit Company, is a sole proprietorship. Ho Yen Sen registered it under the Business Names Act in 1973. It manufactures shampoo under a trade name "Backer" and a trade mark which Ho Yen Sen registered, in his own name, under the Trade Marks Act as early as 1963. In 1976 the defendant went into herbal essence shampoo. The shampoo is sold in bottles with green caps which are of the same size and shape as the bottle, P157, of the plaintiffs. The label on the defendant's bottle, P158, is similar in form and colour to the label on P157. So are the descriptive words on it. But the trade name on the bottle is "Backer". And instead of a young girl in a pool of water, the defendant's label has the trade mark, a yellow circle and in it the device of a bent arm holding an arrow. There are leaves and flowers surrounding the circle about alike but different in size to those on P157.

In the statement of claim the plaintiffs took objection to the entire get-up of the defendant's product. At the hearing, however, it emerged in the evidence of the product manager that the plaintiffs' complaint is "narrowed down to the label" of the defendant's product. He agreed, however, that the distinction between the two labels are Clairol and Backer. Another distinction is the distinctive trade marks on the labels I have described.

The plaintiffs' action is not for infringement of trade mark. It was not appreciated by counsel for the defendant that a passing-off action, an action in common law, is altogether different from the former. The law relating to passing-off is simple to state but often difficult to apply. What it is and why it can be difficult was explained by Wee Chong Jin J. (as he then was) in his dissenting judgment in *Asian Organisation Ltd.* v. *White Hudson & Co.*[1] which was approved by the Privy Council in *White Hudson & Co.* v. *Asian Organisation Ltd.*[2] The learned judge said:

"The fundamental and indeed the only principle of law involved in such an action is this, that nobody has any right to represent his goods as the goods of somebody else. From this cardinal principle it has been laid down that for a plaintiff in a passing-off action to succeed he must establish first, that the particular get-up which he has been using has become associated exclusively with his goods, i.e. he must establish reputation and secondly, that the defendant's get-up is such as is likely to deceive or cause confusion. Therefore, whether a defendant has violated this principle or not is a question purely of fact."

So then, the first issue is whether the get-up of Clairol was known to the public as distinctively theirs. Counsel for the plaintiffs submitted that I should, notwithstanding the evidence of the product manager, consider the whole of the get-up of the plaintiffs' product. It is said for the plaintiffs that they were the first to introduce herbal essence shampoo in Singapore. That, of course, does not give them any monopoly of it. But it is also said that at that time there was no other shampoo in the market of a similar get-up. The reference to get-up is the general appearance of the plaintiffs' product, that is to say the cap, size and shape of the bottle, its transparency, the form of the label and its format.

Now, that submission for the plaintiffs was the very kind of submission that was put before the Court of Appeal in England eighty years ago in the case of *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.*[3] The facts also were analogous to the facts before me. I extract them from the head-note to the case. The plaintiffs sold coffee in circular tins with paper labels. The predominant colour of the label for one quality was red, for another blue, and for the third green. There were three sizes of the tins of each colour. The plaintiffs subsequently adopted enamelled tins in red and blue displaying a reproduction of the labels for the two larger sizes of the two higher qualities. The smaller tins of these qualities and all of the lowest quality were still used with paper labels. The brand "Royal" appeared on the back and front of all the plaintiffs' tins. The defendants sold coffee in circular red, blue, and green tins, all of which were enamelled, resembling in general appearance, but differing in details from the plaintiffs' tins. The brand "Flag" appeared upon the back and front of all the defendants' tins, and their trade mark "Flag" in tricolour was on the front of each tin. The trial court held that the plaintiffs were entitled to an injunction to restrain the use of the tins complained of. The Court of Appeal reversed the decision and gave judgment for the defendants. One reason is that given by Romer L.J. in his judgment at page 55. He said:

"The plaintiffs' goods have been put comparatively recently on the market in their present get-up. This is not the case where a peculiar get-up of goods has been for a long time, for many years, on the market so as to become identified in course of time with the plaintiffs' goods and with no others, so that that get-up almost of necessity is identified in the market or amongst the public as representing the plaintiffs' goods. That is not this case."

The same factual situation exists in the present case that I adopt the words of Romer L.J.

Another reason why the plaintiffs' get-up cannot be known to the public as distinctively theirs is because there is nothing distinctive or novel about their get-up. One has only to walk into any supermarket to see, and I name a few, like drinks, cereals, detergents or insecticides of different brands sold in bottles, boxes or canisters of not dissimilar sizes and shapes. In this context, I adopt *mutatis mutandis* the words of Lindley M.R. in *Payton & Co. Ltd.* v. *Titus Ward & Co. Ltd.*,[4] another case Payton & Co. Ltd. brought, this time against the defendants alleging passing-off of "Palais Royal" coffee sold in tins and labels similar to the plaintiffs. The learned Master of the Rolls said:

"Let us see what the defendants have done and look at what the plaintiffs are seeking to restrain them from doing. Let us take the chocolate tins of the defendants. It seems to me to be quite out of the question to say that these chocolate tins infringe any rights of the plaintiffs. No doubt they are enamelled tins, and no doubt there is a certain resemblance to the plaintiffs. Of course there always is. But why? Because the resemblance consists in what is common to everybody.... When you come to look at the chocolate tins it appears to me that the plaintiffs have no case whatever."

In the case before me too the plaintiffs have no case whatever as regards the bottles or the caps.

I turn to the labels. In considering them, the two ingredients which the plaintiffs must prove, of reputation and deception or confusion become inseparable. As was said by Cozens-Hardy M.R. in the

case of *J.B. Williams Company* v. *R. Bronnley & Co. Ltd.*[5]:

"It seems to me that in the first place [the plaintiff] must, in order to succeed, establish that he has selected a peculiar — a novel — design as a distinguishing feature of his goods, and that his goods are known in the market, and have acquired a reputation in the market, by reason of that distinguishing feature, and that unless he establishes that, the very foundation of his case fails. If he takes a colour and a shape which are common to the trade the only distinctive feature is that which he has added to the common colour and the common shape, and unless he can establish that there is in the added matter such a similarity as is calculated to deceive, I think he must fail."

The plaintiffs claim much had gone in the preparation of the get-up of their label. The question is: what is there that is distinctive about the plaintiffs' label? There are two things. One is the trade name "Clairol", and the other is the trade mark, the graphic design, of a young girl in a pool surrounded by leaves and coloured flowers. The reputation of the plaintiffs' product must be in respect of them. It is in respect of the catch word "Clairol" and the catch to the eye of the graphic design that considerable sums of money are expended in marketing the plaintiffs' product by way of advertisements over the radio, on T.V. and other visual media. But what of the defendant's label? It bears the trade name "Backer" and the trade mark is of the device of a bent arm holding an arrow. I come to the conclusion that the two labels unquestionably do not resemble each other.

The facts of the case are different from the *White Hudson* case, to which reference has been made. That was a passing-off action between Hacks and Pecto medicated cough sweets. The wrappers of the respective sweets bore the respective trade names, but the wrappers were of similar colour. The sweets were displayed by retailers in glass jars and sold in loose form. Some retailers kept both Hacks and Pecto sweets in the same glass jars. And there was a finding by the learned trial judge, Tan Ah Tah J., that customers asked for the sweets in Chinese by reference to the colour of the wrappers. Those brief facts explain the difference between that case and the one for decision. In the context of the present facts, I refer to the words of Lindley M.R. in the *Titus Ward* case. At page 64, he said:

"When you come to look at what the plaintiffs have put on the common features to distinguish their goods, that which they have put on has not been taken by the defendants. On the contrary, the defendants are using that which they have used for the last twenty-two years, and it is an attempt, under the cover of a monopoly, which the plaintiffs are not entitled to, to deprive the defendants of the use of a mark which they have been using honestly, so far as I can see, long before the plaintiffs began to use theirs at all."

In the case before me, too, the sole proprietor of the defendant has used the registered trade mark since 1963, nine years before the plaintiffs came into the market. It is conceded for the plaintiffs that they cannot object to the use by the defendant of his registered trade mark, but it is in relation to the get-up of the label that reference has been made to it. In my judgment the defendant is properly entitled to use its trade name and trade mark. I come to the conclusion that it is the different trade names and trade marks of the two products that distinguish each of them. The rest of the get-up are matters which the plaintiffs cannot probably object to as they are matters common to the trade. And, as I shall come to observe in dealing with costs, there is no evidence, other than that the defendant has acted honestly in using its trade name and trade mark. For these reasons, I hold that the plaintiffs have not made out a case of reputation in the get-up of their product.

In case I am wrong, I now deal with the second issue, whether the use by the defendant of the get-up in Backer was similar to that of the plaintiffs' Clairol, that it has deceived or confused the public between the product of the plaintiffs and that of the defendant. To prove their claim the plaintiffs produced a witness, a private investigator who in April 1976 conducted "a market inquiry to see if any of the herbal essence shampoo that was being sold was similar to Clairol". He tendered his report which is in the Agreed Bundle.

A point the witness sought to make, of confusion in the consumer market, is his evidence that in some of the retailers he visited he saw Clairol and Backer shampoo displayed together. On this evidence, the product manager said that neither the plaintiffs nor the defendant has any control over retailers in how they display their goods. It cannot therefore, as a matter of inference even, be said that the defendant had by his conduct brought about that circumstance. (See: *Boh Plantations Sdn. Bhd.* v. *Gui Nee Chuan & Ors.*[6]). There is another observation, I make on the evidence. I have counted the number of visits made by the witness to retailers which are in his report. Of the fifty-four places he went to, only in six did he see Clairol and Backer displayed together. Not only is it a negligible percentage, in my judgment, it is not evidence to support the submission for the plaintiffs that confusion arises when the defendant's product is placed together with the plaintiffs' product. To the contrary, the fact that the witness saw them displayed together and knew the difference is *per se* evidence that he was not confused. In this context, I will have more to say later on the probative value of witnesses in a passing-off action.

The material evidence of the private investigator is that he gave to two of his assistant investigators, and three, it would appear, members of the public, each a bottle of shampoo of either Clairol or Backer, and told them to go to certain retailers and buy a similar bottle. Again, I have reckoned the exercise carried out from the facts in the Agreed Bundle. On twenty-four occasions when they went with a bottle of Clairol, they returned with twenty Clairol and four Backer. But on twenty-one occasions when they went to buy Backer, they returned with thirteen Backer and eight Clairol. Given the *bona fide* of the exercise, to my mind, it does not demonstrate that there was deception or confusion to the prejudice of Clairol. If at all, it was to the prejudice of Backer.

I now want to say a few words on the investigations carried out by the plaintiffs to bring this action for passing-off and the kind of witnesses that were produced in court to prove deception or confusion. I rely on what Romer L.J. at page 57 in the *Snelling* case:

"It seems to be a sort of popular notion of some witnesses that in considering whether customers are likely to be deceived, you are to consider the case of an ignorant customer who knows nothing about, or very little about the subject of the action. That is a great mistake. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiff's goods, those characteristics which distinguish his goods from other goods on the market so far as relates to general characteristics. The customer must be one who, knowing what is fairly common to the trade, knows of the plaintiff's goods by reason of these distinguishing characteristics. If he does not know that he is not a customer whose views can properly, or will be, regarded by this Court."

Finally, still on the second issue, I attach "very great importance", as did the Court of Appeal in the *Snelling* case, to the price difference between the two products that there cannot be confusion or deception between them. It is in the Agreed Bundle that the plaintiffs' bottle of Clairol, like P157, is sold for $4.20. The defendant's Backer, however, is sold at a price range which varies from $3.50 to as low as $2.30. In the competitive consumer market today if there is anything that customers would take notice of at all, the one thing that they would notice is the price they have to pay for a product.

What I have said is sufficient to dismiss the action. But there is another claim of the plaintiffs, that of infringement of copyright, the law in which is complicated. In the defence, the defendant put the plaintiffs to prove the copyright and its infringement. In the way the action was fought out, the claim for infringement was a subsidiary one. It is sufficient to say that neither the copyright, and far less, the infringement of it was proved. That claim also fails.

As regards costs, counsel for the plaintiffs submitted that if the plaintiffs fail in this action there should be no order as to costs. In considering the matter, it is relevant to refer to the background of this action. On July 7, 1976, the plaintiffs' solicitors wrote to the defendant alleging passing-off. The defendant, without admission of liability, made some changes (as I see them, they are minor changes (see Exhibit D2)) to the label of Backer and were willing to give an undertaking not to use the label which the plaintiffs complained of. It seems to me therefore that the defendant had at all times acted honestly. But the plaintiffs were not satisfied. They wanted the defendant to indemnify them in respect of all expenses they had incurred up to then which they quantified in the sum of $6,796. The defendant refused to pay. It was then that the plaintiffs commenced this action. The plaintiffs have exerted a monopoly which they never had and cannot have in the get-up of their product. There is no reason why costs should not follow the event. The plaintiffs' claim is dismissed with costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Quek Kai Kok.*

TECK SENG & CO. v. WILLIAM EU KENG YUET

[D.C.A. (Wee Chong Jin C.J.) May 6, 1980]
[Singapore — District Court Appeal No. 3 of 1978]

Practice and Procedure — Notice to quit to deceased tenant — Whether effective — Probate and Administration Act (Cap. 23), s. 37.

Landlord and Tenant — Notice to quit — Death of tenant unknown to owner of premises — Effect of notice to quit addressed to deceased tenant — Probate and Administration Act (Cap. 23), s. 37.

In August 1943 Ng Huat Lye became the tenant of No. 59, Tanjong Pagar Road which was then owned by Eu Tong Sen Ltd. Monthly rents were paid to and rent receipts issued by the landlords to "Teck Seng Kongsi — Ng Huat Lye". Ng Huat Lye died in August 1971 but the present occupiers of the premises, the appellants, continued to pay the monthly rents to the landlords who continued to issue rent receipts to "Teck Seng Kongsi — Ng Huat Lye" because they were unaware that Ng Huat Lye had died. In 1976 the respondent became the owner of the premises and, being unaware that Ng Huat Lye had died, sent a notice to quit addressed to "Mr. Ng Huat Lye, 59 Tanjong Pagar Road, Singapore" determining the tenancy on January 31, 1977. The notice to quit was served at the premises on the occupiers who refused to comply with the notice to quit.

The respondent commenced proceedings against the appellants for possession.

The court below gave judgment against the appellants who appealed.

Held, dismissing the appeal: where the person in occupation continues to pay the rent to the landlord after the death intestate of the tenant he can only lawfully do so as agent of the Chief Justice in whom the estate of the deceased tenant was vested by operation of law and a notice to quit served on an agent is a notice to the principal.

Case referred to:-

(1) *Lai Seng Fook* v. *Tang Kong Low* [1978] 1 M.L.J. 158

DISTRICT COURT APPEAL.

G. Murugaiyan for the appellants.

Kirpal Singh for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: In August 1943 Ng Huat Lye became the tenant of No. 59, Tanjong Pagar Road, which was then owned by Eu Tong Sen Ltd., at the monthly rent of $30. A deposit of $30 was paid and a receipt dated August 12, 1943 was issued by the landlords to "Teck Seng Kongsi — Ng Huat Lye." Thereafter the monthly rents were paid to and rent receipts issued by the landlords to "Teck Seng Kongsi — Ng Huat Lye."

Ng Huat Lye died in August 1971 but the present occupiers of the premises, the appellants, continued to pay the monthly rents to the landlords who continued to issue rent receipts to "Teck Seng Kongsi — Ng Huat Lye" because they were unaware that Ng Huat Lye had died. In 1976 the respondent became the owner of the premises and, being unaware that Ng Huat Lye had died, sent through his solicitors in December 1976 a notice to quit which was addressed to "Mr. Ng Huat Lye, 59 Tanjong Pagar Road, Singapore" determining the tenancy on January 31, 1977. The notice to quit was served at the premises on the occupiers who refused to comply with the notice to quit.